IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-253

NOLAN ESTES, et al.,

Petitioners,

—versus—

OAK CLIFF BRANCH, SOUTH DALLAS BRANCH AND JOHN F. KENNEDY BRANCH OF THE METROPOLITAN BRANCHES OF DALLAS, NAACP, 78-282

Respondents,

and

RALPH F. BRINEGAR, et al.,

Petitioners,

—versus—

OAK CLIFF BRANCH, SOUTH DALLAS BRANCH AND JOHN F. KENNEDY BRANCH OF THE METROPOLITAN BRANCHES OF DALLAS, NAACP, 78-283

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and

DONALD R. CURRY, et al.,

Petitioners,

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Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The remand opinion of the United States Court of Appeals for the Fifth Circuit now at issue appears as the Appendix C to the Petition of Nolan Estes, et al., at pages 130a-146a, and reported at 572 F.2d 1010. Other opinions, orders and judgments of the District Court are found in Appendix B to Petition of Estes, pp. 4a-129a.

For a full listing of other opinions, rulings and judgments, see 512 F.2d 92, 95 (5th Cir.), cert. denied, 423 U.S. 939 (1975).

Jurisdiction

The Court of Appeals' judgment remanding the pupil assignment portion of a school desegregation plan for the elimination of de jure segregation to the District Court, was entered on *April 21*, 1978. This court's certiorari jurisdiction is invoked under 28 U.S.C. 1254.

Question Presented

Whether any issue warranting this Court's review is presented by the Court of Appeals' remand of the case to the District Court for the formulation of a new student assignment plan for an unremedied statutory dual system, along with instructions to consider the feasibility of adopting *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971) desegregation tools or to make specific findings of facts in connection therewith.

Statement

Negro children and their parents have sought the desegregation of the Dallas Independent School District (DISD) since July, 1955 when an action was brought to desegregate the facilities of DISD.[1] After extensive litigation, including appeals, the law of this case is that DISD is a state-imposed dual school system.[2] Remedial steps to dismantle the segregated condition were ordered by the Fifth Circuit, *Tasby* v. *Estes*, 517 F.2d 92 (5th Cir. 1975), *cert. denied*, 424 U.S. 939 (1975). On remand this respondent was allowed to intervene on behalf of the Metropolitan Branches of the Dallas NAACP and individual parents and children to participate in the remedial phase. *Tasby* v. *Estes*, 412 F.Supp. 1192 (N.D. Tex. 1976). From the district court's approval of a plan respondents appealed on the ground the "plan" approved by the district court did not meet minimum constitutional standards.[3] *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971); *Green* v. *Co. School Bd. of New Kent Co.*, 391 U.S. 403 (1968); *Davis* v. *Bd. of School Commissioners of Mobile*, 402 U.S. 33 (1971).

The Court of Appeals found that the plan divided DISD into six subdistricts, one of which is nearly all black and contains only one-race schools. It has 27,500 students attending sixteen schools. (A one-race school was defined as

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[1] For a chronology of this litigation, see *Tasby* v. *Estes*, 517 F.2d 92, 95 (5th Cir.), *cert. denied*, 423 U.S. 939 (1975).

[2] As the Court of Appeals noted at fn. 18, "Even after the Supreme Court's decision in *Brown* v. *Board of Education*, 349 U.S. 294 (1955), Texas laws required segregation. The penalties for violating the statutes included loss of funding and accreditation. 412 F. Supp. at 1189.

[3] Under the present plan in operation since 1975 seventy-three (73) one-race schools remain segregated. Of these fifty-nine (59) are elementary schools, six 4-8 schools and eight 9-12 high schools. *Tasby*, 572 F.2d 1010 at 1012.

one with a student body with approximately 90% or more of the students being either Anglo or combined minority races.) In the other five subdistricts, containing some 16(schools, over fifty are still essentially one-race schools.

Furthermore, the Court of Appeals found that the district court's order leaves high school students in the neighborhood schools. Within three of the four integrated subdistricts (exclusive of East Oak Cliff, the black subdistrict, and Seagoville, the one predominately Anglo subdistrict), this results in high schools that are still one-race schools.

Moreover, contrary to *Swann,* 402 U.S. at 26-27, the district court's order placed the burden of transporting children participating in the majority to minority transfer option, on students and parents rather than on the school board.

After a thorough analysis of the components of the desegregation plan adopted by the district court, the Fifth Circuit again remanded the student assignment portion for further consideration. The remand order required the district court to modify the student assignment plan *only* if the continued existence of one-race schools is not justified by findings of facts. *Tasby* v. *Estes,* 572 F.2d 1010 (5th Cir. 1978), Petitioners applied for a rehearing and rehearing *en banc.* Both were denied by the Fifth Circuit on May 22, 1978. Defendants' Appendix D. *Estes* Petitioners moved for a stay of mandate pending certiorari and same was denied by the Court of Appeals on August 14, 1978. A Petition for Certiorari together with an Application for Stay were filed with this court. The latter was referred to Mr. Justice Powell who denied same in Chambers.[4]

[4] Two other issues were appealed by respondents, i.e. the exclusion of Highland Park Independent School District from the desegregation plan and the acquisition and sale of certain property.

Reasons Why the Writ Should Be Denied

A. The *Swann* Mandate

All of the petitioners[5] are attempting an end run to this court around the clear and common-sense remand direction of the Court of Appeals. That court held that a remand was necessary because:

> "We cannot properly review any student assignment plan that leaves many schools in a system one-race without specific findings by the district court as to the feasibility of these techniques . . . . There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing. 572 F.2d at 1014. (Other citations omitted)

Such a remand was required by this court's holding in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), that where *de jure* segregation is found to exist one-race schools are subject to strict scrutiny because:

> [W]here the school authority's proposed plan for conversion from a dual school system to a unitary system contemplates the existence of some schools that are all of predominately one-race, *they* have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial

[5] The issues raised by ***Brinegar petitioners*** and the ***Curry petitioners*** in their petitions for certiorari will be treated in this section.

composition is not the result of present or past discriminatory action on their part. *Swann*, 402 U.S. at 26.

The Court of Appeals found as a fact that the DISD acknowledged the harmful effect of one-race schools upon "the finding of a unitary system." It also noted that the district court had failed to make the specific findings as to why these schools could not be desegregated using and adopting the techniques approved in *Swann*. This failure by the district court impaired the ability the reviewing court to properly evaluate the plan. Consistent with the holding in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), 53 L.Ed.2d 851, 97 S.Ct. 2766 the Court of Appeals remanded for the findings of appropriate facts. As Mr. Justice Rehnquist wrote in *Dayton*, a basic significance of *Dayton* was its holding with respect to the proper allocation of functions for factual determination by district courts and their review by appellate courts.

The Court of Appeals was the appropriate tribunal in position to determine whether a fact circumstance was in sufficient posture for an appellate evaluation. Also, the remand here must be read in the context of the history of this 21 year old litigation. On several occasions during the life of this case the district court has been advised to invoke the *Swann* inquiry with respect to one-race schools with respect to this statutorily created dual system and to assay the feasibility of the assignment methods which should be considered, or, in the alternative, to make appropriate findings.

Once again, the district court has neither made those specific feasibility findings, nor has it ordered the utilization of the *Swann* desegregative tools. It is clear that without such findings of fact by the district court, the Court of

Appeals is unable to review the judgment or ascertain whether the school district has met the *Swann* burden of justification, i.e. lack of feasibility in assigning children so as to eliminate the dual system, or that the segregation was not the result of present or past discriminatory action.

The only justification advanced by the petitioners and which they implore this court to adopt are (1) there is a majority of minority students in the system, and that (2) the system is large, (3) that they have devised "innovative" plans, and (4) "white flight" will result if total desegregation is ordered.

Petitioners submit that such assertions do not rise to the level of *Swann*-required justification. They are constitutional irrelevancies. At this point, to the extent that facts have not been found, they cannot be reviewed. To the extent they are unreviewed by the Court of Appeals they are not in a posture for consideration by this Court, *Dayton* v. *Brinkman*, 433 U.S. 407. To the extent the petitioners assert legal principles which run contra to the unanimous holdings of this Court the Court of Appeals has no duty to adopt them. Indeed it is dutybound to reject them.

Petitioners argue as though *Brown* v. *Board of Education* had never been decided and that *Cooper* v. *Aaron's* lesson has no application today. *Brinegar petitioner*, for instance, suggest that popular acceptance of a plan somehow relaxes the constitutional imperative to eliminate *de jure* segregation from the Dallas school system. *Brown* and *Cooper* v. *Aaron* have been reaffirmed time and again as controlling, i.e. that disagreement with desegregation is no justification for thwarting it.

Brinegar petitioners, in grabbing at every straw, argue that the district court should be required to make *Davis*,

Austin and *Brinkman* findings on the subject of intent. The simple fact is that the law of the case is that DIDS is a *de jure* segregated system, which has never rid itself of the unconstitutional duality.

Segregation in Texas, unlike in Ohio, was mandated by law until after 1954. The Court of Appeals and the District Court have already found that segregation is state imposed, that the segregated schooling in Dallas has never been eliminated and that there still exists a current condition of racial segregation. The lower courts have held that this dual system has been perpetuated through constitutional violations. This constitutes the law of the case. In such a situation where explicit findings of *de jure* segregation exists and there is as here, an explicit finding that the *de jure* system has not been dismantled, "root and branch" is mandated.

B. Petitioners Misread *Milliken II* as Mandating Ancillary Relief in Lieu of Desegregation

But as a substitute for eliminating that which offends the Constitution, the petitioners' claims of "innovations" do bear close scrutiny. Magnet schools, alternative schools and the like have been found to be singularly ineffective desegregation devices for systems with system-wide segregation, although their use as educational programs in conjunction with actual desegregation has been found unexceptional.

In Dallas, the experience with such plans as the primary tool of desegregation has been, like its predecessor pupil placement plans of the 1950's, totally inadequate to eliminate the dual system.[6]

[6] The NAACP's brief cites a statement to the press by Dr. Nolan Estes, Superintendent of the DISD, that the magnet school concept has not been effective in desegregating the school system in Dallas. *Tasby, supra*, 572 F.2d at 1015, and n. 15.

The Court of Appeals ordered:

> "The district court is again directed to evaluate the feasibility of adopting the *Swann* desegregation tools for these schools and to reevaluate the effectiveness of the magnet school concept."

In their attempt to suggest a conflict between the holding of this Court in *Milliken II infra* and the remand action of the Fifth Circuit Court of Appeals, petitioners imply that the reviewing court questioned the propriety of ancillary relief. Even a casual reading of the opinion demonstrates that the Court of Appeals specifically deferred to the judgment and widest possible discretion of local educators. In language most clear the court stated: *"We defer to the DISD's expertise in establishing suitable programs for the school children of Dallas."* Emphasis added.

While the Court did caution, that on remand the district court should reconsider the other provisions of its plans in the light of the relief it ultimately orders, it allowed in Note 8, that:

> "Because we wish to grant the district court enough latitude on remand to devise a plan that will be workable, we are not binding it to the present non-student-assignment portions of its orders."
>
> *Tasby* 1017

Considering that *de jure* segregation is the law of the case, *Milliken II* permits a federal court to compel the various ancillary programs as a part of the remedy. Here, an imposition of those programs was not necessary: the school authorities and community affirmatively developed their own. The only problem they encounter, constitutionally, is in seeking to implant them in lieu of pupil "root and branch" desegregation. For sure, the lack of necessity

for the court to impose those programs can not logically be convoluted, as petitioners seek to do, into a disregarding by the Court of Appeals of the traditional equitable authority and duty of the federal courts to root out the violation by rendering "a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *United States* v. *Louisiana*, 380 U.S. 145, 154, 156 (1956), for it is "the historic purpose of equity to 'secur[e] complete justice.' *Brown* v. *Swann*, 10 Pet. [U.S.] 497, 503 (1836)." This principle has been reiterated over and over again by this court. *Swann* v. *Charlotte Mecklenburg*, 402 U.S. 1, *Keyes* 15 (1971), *Dayton* v. *Brinkman*, 403 U.S. 406, *Milliken I*, 418 U.S. 717 and *Milliken II*, 419 U.S. 815. Also see: *Evans* v. *Buchanan*, 423 U.S. 1080, and Stay Denied, J. Brennan, in Chambers, 1978.

The district court having left a large number of children locked into segregated one-race schools, *Swann* renders them suspect. The Court of Appeals properly remanded to the district court for it to require the DISD to justify their continued existence. So long as this burden has not been met, and the other *Swann* techniques, i.e. pairing and clustering, untried and time and distance facts absent, the Court of Appeals is not in a position to responsibly discharge its reviewing functions.[7] It is thus clear that no conflict exists between the remand here, and *Swann, Milliken* and *Dayton*.

Not until the Court of Appeals has an opportunity to fully evaluate the "plan" of desegregation will it be able to reach a judgment with respect to its squaring with the Constitution. The granting of certiorari at this stage would

[7] "[T]he case is every bit as important for the issues it raises as to the proper allocation of functions between the District Court and the Court of Appeals within the federal system." *Dayton* p. 857, *supra*.

be premature, subversive of the authority and responsibility of the district court to make factual findings, in the first instance.[8]

C. Piecemeal Appeals; The Remand Below Was a Correct Exercise of Jurisdictional Power of the Court of Appeals

We have made it abundantly clear that this is a particularly inappropriate case, and this is a particularly inappropriate juncture for the exercise of this Court's certiorari jurisdiction in view of the fact that piecemeal review is particularly unsuited to school desegregation cases. The legal arguments of petitioners are not only unconvincing and contradictory, they are clearly wrong. On the one hand they argue for *Dayton*, which affirms *Swann*, and on the other, they are challenging the Dayton-type remand to the district court for the purpose of engaging in fact-finding to supplement a deficient record. Thus, respondents deem it advisable to discuss the issue of piecemeal appeals, which this court discourages, but which petitioners seek here.

When the record is supplemented and reviewed, petitioners will have an opportunity to test those conclusions which will emanate from that review. The course of action sought here by petitioners, on issue unreached and unresolved by the Court of Appeals, would result in effect, in a direct review of those matters directly from district court. See Rule 20 of the Supreme Court Rules. This would, indeed be judicial leap frogging of the most unseemly type.

[8] "The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings. . . . It must then fashion a remedy in the light of the rule laid down in *Swann*, *supra*, and elaborated upon in *Hills* v. *Gautreaux*, 425 U.S. 284, (1976)." *Dayton, supra*.

There can be no justifiable reason for such an exceptional exercise of this court's certiorari jurisdiction. Clearly, then, logic and precedent argue loudly against review of these matters at this time.

And there are the practical considerations set forth by Judge Friendly in *Taylor* v. *Board of Education of New Rochelle,* 288 F.2d 600 (1961) which apply with increased force to the determination whether to utilize an extraordinary procedure which "deprives . . . this Court of the benefit of consideration by a Court of Appeals." *Brown Shoe Co.* v. *United States,* 370 U.S. at 355. The vital role which the Court of Appeals could play in resolving factual disputes and narrowing the issues is apparent from the nature of this case and of the primarily factual deficiencies noted by the Court of Appeals.

This court sits principally to correct legal, not factual errors.

While there may be occasions when the importance of an issue merits dispensing with intermediate appellate review (see cases cited in Rule 20 Supreme Court Rules), it is hardly conceivable that this court could render anything but advisory pronouncements if it is to interpose its power between the intermediate and district courts, thereby barring the development of a full factual record.[9]

[9] On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Prac. 52(b). If it decides that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. *Dayton, supra.*

D. Fear of "White Flight" Not a Proper Basis for Maintaining One-Race Schools

The remedy for a system-wide violation is "all out desegreation" *Keyes,* 413 U.S. at 214. And in *Davis* v. *Board of Education Commissioners,* 402 U.S. 33, 37, this court stated that having once found a violation, which was done here, "the district judge or school authorities should make every effort to achieve the greatest degree of actual desegregation, taking into account the practicalities of the situation." Of course "desegregation" can be neither more nor less than the elimination of racial discrimination and all of its lingering effects, "root and branch." *Swann, supra, Green, supra, Davis, Morgan, infra, Milliken I, supra.*

Petitioners totally misapprehend the foregoing and instead contend that the Court of Appeals, in insisting upon a factual record sufficient to permit proper appellate review, is acting with judicial audaciousness. In so doing petitioners unleash a number of reasons as to why the schools of DISD should continue segregated, including fear of "white flight." They invite a ruling from this court that would permit the Constitution to have a different meaning in the urban areas than it has in a rural setting. The justification for such a new rule is the so-called urban education crisis.

The inappropriateness of such a call in the context of and the posture of these proceedings is obvious. This is not to say that a district court or Court of Appeals can be absolutely insensitive to the reality of and variety of private reactions to desegregation plans. Most courts are extremely alert to this possibility and accordingly, select plans that promise to cause the least adverse private reaction and yet transform a dual system into one of "just schools." *Green, supra.*

Where so-called "white flight" is a concern, as petitioners insist that it is here, courts are free to address that prob-

lem by the inclusion of programs that will address the perception of some schools being "inferior." Under no circumstance can fear of private reaction be the basis for perpetuating the condition which offends the Constitution, or for otherwise abandoning, even so slightly, the goal of eliminating racial discrimination and all of its lingering effects. See: *Morgan* v. *Kerrigan,* 530 F.2d 401, C.A. 1, *cert. denied sub nom.; White* v. *Morgan,* 426 U.S. 935; *Hobson* v. *Hansen,* 269 F.Supp. 401 (D. D.C.) *appeal dismissed* 393 U.S. 801; *Cooper* v. *Aaron,* 358 U.S. 1; *Monroe* v. *Bd. of School Comm.,* 391, 429 U.S. 450, 459; *Brunson* v. *Board of Trustees,* 429 F.2d 820, 823-827 (CA 4) (*en banc*); (Sobeloff, J. concurring). Also see *Milliken I, supra.*

CONCLUSION

WHEREFORE, for the foregoing reasons, these Respondents respectfully pray that the petition for a Writ of Certiorari be denied.

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Certificate of Service

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